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Case Comment

THE RULE-MAKING POWER OF OHIO COURTS

The doctrine that courts have inherent power to make rules has been given new vigor in Ohio by the recent case of *State, ex rel. Shube, v. Beck*, 17 Ohio Law Abstract 529. (Decided May 14, 1934, in the Stark County Court of Appeals.) The court unanimously upheld the power of the Stark County Common Pleas Court to require ten dollars security for costs by rule of court, on the ground that a court has inherent power to make rules. The opinion is without citation of authority.

Perhaps one of the reasons for this lack of authority is that Ohio has been one of the states which has given only lip service to the doctrine of the inherent rule-making power of courts. On the point in question the Supreme Court of Ohio had taken the opposite view less than a year before. In a one sentence opinion the supreme court, feeling itself bound by the case of *Cleve-*

land Railway Co. v. Halliday, 127 Ohio St. 278, 188 N. E. 1 (1933), held that the Common Pleas Court of Cuyahoga County did not have the power to demand security for costs by rule of court. *Busher v. Macek*, 127 Ohio St. 554, 190 N. E. 200. (Decided December 13, 1933.) Weygandt, C. J., and Bevis, J., dissented.

The Halliday Case, *supra*, held that the Common Pleas Court of Cuyahoga County had no power to provide by rule of court for a jury of six, instead of twelve, in civil cases where no "demand for a greater number than six in writing shall be filed with the Assignment Commissioner before such cases appear in any active list published on and after April 11, 1932." The decision was based largely on the fact that jury trial was considered a matter of substantive right and not procedure. As an additional reason the court, considering that the reduction of a jury to six virtually amounted to a waiver of jury, held that inasmuch as the legislature had provided for waiver of jury in certain instances a court could not add to them. To do so would be in conflict with the implied will of the legislature that there should be no waiver except in the instances specified. Since the requirement of security for costs can not be considered as other than a regulation of procedure, it must be upon this second ground in the *Halliday Case* that the *Busher Case* was based. The principle of the *Busher Case* seems to be that when a rule of court conflicts with a legislative intent, though it be inferred from the silence or absence of a statute, the rule is void.

One of the most confusing elements in the consideration of the power of courts to make rules is the existence of statutes purporting to give the courts this power. The United States and almost every state have such statutes. Ohio is particularly unfortunate in this regard in having had such legislation for over a hundred years. 29 Ohio Laws, 72, 81 (1831), 50 Ohio Laws, 68 (1852), 81 Ohio Laws, 170 (1884), 82 Ohio Laws, 21 (1885). For present enactments see Sections 1473, 1522, 1556, 1558, 1698, and 10501-13, General Code. If the power of the courts to make rules is derived from the legislature, one may readily concede the proposition that any rule in conflict with any express or implied will of the legislature is void. But if the power to make rules is inherent in the courts, such a view cannot be accepted.

Outside of Ohio there is abundant authority that courts have the inherent power to make rules. English courts have exercised such power for several centuries. See in William Tidd, *The Practice of the Courts of the King's Bench and Common Pleas*, 9th ed. (London, 1818), p. xxxvii the chronological table of general rules, orders and notices. See also p. lxxi.

Two kinds of fact patterns illustrate the inherent power of courts to make rules.

1. Where no enabling statute grants the power to make rules. In a decision upholding the validity of the New York rule of court providing for summary judgments, it was pointed out that the Supreme Court of New York had exercised the power to make rules for 86 years before there was a state legislature and for 137 years prior to the enactment of the statute which had been referred to as the source of the power. *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. S. 43, 51 (1922). Judgment affirmed in memorandum opinion, 235 N. Y. 534, 139 N. E. 724 (1923). See also *General Investment Co. v. Interborough Rapid Transit Co.*, 235 N. Y. 133, 532, 139 N. E. 216,

723 (1923). The Courts of Common Pleas and District Courts of Pennsylvania had made rules long before the enactment of any statute on the subject, as an incident to the power to regulate the pleadings and practice before them. *Hurres v. Commonwealth*, 35 Pa. 416, 418 (1860).

2. Where the statute or constitution which purports to grant such power to one group of courts, makes no mention of other courts. The Kansas Code gave express authority to the judges of the supreme court to make rules of practice applicable to all courts of record. No such authority was granted to the district courts. A rule of the district court limited the time within which cases made shall be noticed for settlement to ten days after the service of amendments. The rule was held to be a valid exercise of the inherent power of a court of record. *Jones v. Menefee*, 28 Kan. 436, 438 (1882).

The converse situation arose in the state of Washington. Its constitution provides that the judges of the superior courts shall establish uniform rules for the government of the superior courts. A rule of the supreme court enumerated the instances in which the testimony of a witness might be taken by deposition. This rule was upheld in *State, ex rel. Foster-Wyman Lumber Co., v. Superior Court for King County*, 148 Wash. 1, 267 Pac. 770 (1928). The court held the constitutional provision not to be a grant of power to the superior courts which would deprive the supreme court of similar power, but a limitation upon the superior courts that required their rules be "uniform." Such refined reasoning to warp an obvious grant of power into a limitation upon power shows to what lengths a court will go in order to uphold the doctrine of inherent power to make rules.

The validity of a rule of court has seldom been successfully challenged upon the ground that the court had no power to make it, where there was no statute covering the matter. However that challenge has often been successful where the provisions of a rule have conflicted with those of a statute regulating the same subject matter. A leading case is that of *Van Ingen v. Berger*, 82 Ohio St. 255, 92 N. E. 433, 19 Ann. Cas. 799 (1910). In that case a default judgment was held valid because it satisfied the terms of the statute, although no notice of the default was given in the *Court Index* as required by rule of court. The court held that if a rule of court conflicted with a statute the rule would be disregarded. This view has been severely criticized on the bases of logic and policy. John H. Wigmore, "All Legislative Rules for Judiciary Procedure Are Void Constitutionally," 23 Illinois Law Review, 276 (1928).

Aside from the issue of power involved in the conflict between statutes and rules of court, is the question whether the legislature or the court is more qualified to regulate practice and procedure. The legislatures of several states have frankly conceded the superior ability of the courts to handle these matters by providing that rules of court may supersede statutory regulation of the same subject matter.

In the recent statute allowing the Supreme Court of the United States to make uniform rules regulating the practice and procedure in civil actions at law, Congress provided that "all laws in conflict therewith shall be of no further force or effect." June 19, 1934, c. 651, No. 1, 48 Stat., U. S. C. A. 28 No. 723b. Such a provision was contained in a bill recommended for passage in Ohio. Apparently it was unacceptable to the legislature. Report

of Committee to Investigate the Judicial System of Ohio, 1915. Proposed bill, Sec. 2.

Enactments allowing rules to supersede statutes have been upheld, generally upon the ground that such rule-making power is inherent in the courts. *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931) *In re Constitutionality of Section 251-18, Wisconsin Statutes*, 204 Wis. 501, 236 N. W. 717 (1931), *State v. Superior Court*, *supra*.

The position of the court in *Busher v. Macek*, *supra*, seems to be entirely unjustified on either authority or reason. *Cleveland Railway Co. v. Halliday*, *supra*, cannot be considered as authority because that case was one involving substantive rights as distinguished from mere procedure. Nor is the case of *Van Ingen v. Berger*, *supra*, authority for the extreme position taken. As has been seen, the *Van Ingen Case* involved a direct conflict between the provisions of a statute and those of a rule of court. The *Busher Case* goes a step further by holding invalid a rule of court when in conflict with a legislative intent inferred from the silence or absence of a statute.

The view taken in the *Busher Case*, if carried to its logical extreme, would invalidate the bulk of the rules of court in this state. There are few subjects not in some way regulated by statute. Under the doctrine of the *Busher Case*, it would only be necessary to show that the subject is in some way regulated by statute. Then, if a rule of court regulates the same subject, even in an entirely different aspect, the rule would be void because the silence of the statute on the aspect of the subject regulated by rule must be inferred to mean a legislative intent that it should not be regulated. The logical implications of such a view should make the supreme court reconsider its position and support that of *State, ex rel. Shube, v. Beck*, *supra*. Until that is done, procedural reform by rule of court is impossible in Ohio, unless the legislature authorizes rules of court to supersede procedural statutes.

ABRAHAM GERTNER.

CONCLUSIVENESS OF FINDING OF DATE OF DEATH OF PRESUMED DECEDENT

Fanny Ernst, mother of George A. Webber, died on September 5, 1930. Morrissey as administrator of the estate of Webber, a presumed decedent, made demand of McCorry for the funds held by him as administrator of the estate of Fanny Ernst. The claim of Morrissey was based on the finding of the probate court of Hamilton County that the death of George A. Webber was presumed to have occurred subsequent to the death of his mother.

Smith, guardian of Medina Webber, joined with Walter Webber in this petition. They alleged that George A. Webber, father of Walter and Medina, had been absent and unheard from for a period of over eight years antecedent to the death of his mother; that the presumption of his death arose before the date of his mother's death, and that Walter and Medina were therefore her sole heirs and entitled to the proceeds of her estate.

It was held by the Court of Appeals, Fourth District, that the pleading of the petitioners was sufficient to create a legal presumption that George A.